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No. 91-1018

Supreme Court, U.S.

FILED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THE NORTHERN TRUST COMPANY,
Successor Guardian of the Estate
of **SHELBY ANDERSON MORAN**, a Disabled Person,
Petitioner,

v.

THE UPJOHN COMPANY, JOHN J. BARTON, M.D.,
and **ILLINOIS MASONIC MEDICAL CENTER,**
Respondents.

**Petition For Writ Of Certiorari To The Appellate
Court Of Illinois, First Judicial District**

**BRIEF OF JOHN J. BARTON, M.D.,
IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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QUESTION PRESENT

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ED FOR REVIEW

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STATEMENT OF THE CASE

Petitioner brought this case in the Circuit Court of Cook County, Illinois against this Respondent, John J. Barton, M.D., an obstetrician/gynecologist. Petitioner also sued Respondents Illinois Masonic Medical Center and The Upjohn

Company. She alleged to have suffered damages as a result of the administration of a drug known as Prostaglandin F2 Alpha during a second trimester abortion performed on her by this Respondent. A jury in the Circuit Court of Cook County found in Petitioner's favor and against all Defendants, and a judgment was entered on a verdict.

The Illinois Appellate Court reversed that judgment, finding that Petitioner had failed to prove her case against all three Respondents. As against Dr. Barton, the Illinois Appellate Court held that the expert witness offered by Petitioner was unqualified to testify against Dr. Barton as a matter of Illinois law, because he was neither an obstetrician/gynecologist nor acquainted with the use of Prostaglandin F2 Alpha. (Petitioner's Appendix, at pp. 17A-20A.)

As against Upjohn, the Court held that Petitioner had failed to introduce any expert testimony to establish her allegations that Upjohn's drug product warning was inadequate. (Petitioner's Appendix, at pp. 16A-17A.) It held that Upjohn's expert witness's testimony that the warnings were adequate therefore stood uncontroverted. Finally, the Court also held that Petitioner's expert testimony failed to establish that the attending nurses deviated from the standard of care so as to render Illinois Masonic Medical Center liable. (Petitioner's Appendix, at pp. 20A-23A.)

Contrary to the statements in Petitioner's Statement of the Case, this Respondent states that the Appellate Court's ruling as to him was not a question of first impression under Illinois law. (Petitioner's Appendix, at pp. 18A-20A.)

Petitioner's Petition for Leave to Appeal from the decision of the Illinois Appellate Court was denied by the Illinois Supreme Court on October 2, 1991. (Petitioner's Ap-

pendix, at p. 25A.) Petitioner's motion for leave to file a motion for reconsideration was denied by the Illinois Supreme Court on November 24, 1991. (Petitioner's Appendix, at p. 25A.)

SUMMARY OF ARGUMENT

In ruling that Petitioner had failed to make a *prima facie* case against this Respondent, the Illinois Appellate Court only applied established principles of Illinois tort law. There is no federal question involved as against this Respondent, and, although not directed against him, the remainder of the Petition presents no federal question against any Respondent. Petitioner has not attempted to discuss the considerations governing review on Writ of Certiorari set forth under this Court's Rule 10. There is no possible federal law question involved in a state court's ruling that a medical malpractice plaintiff has failed to meet her burden of proof as a matter of state tort law. Accordingly, Petitioner's Petition for Writ of Certiorari should be denied.

ARGUMENT

NO FEDERAL LAW QUESTION IS INVOLVED HERE.

This Court has stated that a Writ of Certiorari should be granted only if there are “special and important reasons for it.” *Fay v. Noia*, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963). This Court has no authority to review a state determination of purely state law. *International Longshoremen’s Ass’n., AFL-CIO v. Davis*, 476 U.S. 380, 106 S.Ct. 1904, 90 L.Ed.2d 389 (1986). But that is all that is presented by the Illinois Appellate Court decision from which Petitioner seeks review by this Court.

This Court is familiar with the considerations governing review on Writ of Certiorari as set forth in this Court’s Rule 10.1. There is no need to review those considerations in detail here. Suffice it to say that Petitioner’s Petition does not attempt to address those considerations. It does not refer to any conflicts among federal circuits, among any state courts of last resort or between state and federal courts.

Moreover, as against this Respondent, there is no attempt to refer to any federal statute, rule or regulation. The closest Petitioner comes to connecting her case against this Respondent with federal law is a reference to the Seventh Amendment right of trial by jury. But how the Illinois Appellate Court infringed on that right by deciding Petitioner failed to meet her burden of proof at trial is difficult to comprehend. The Illinois Appellate Court deprived her only of a favorable verdict, not a jury trial.

In its opinion, the Illinois Appellate Court explained that Illinois cases have required a medical malpractice plaintiff to introduce competent expert testimony to prove a

deviation from the standard of care. (Petitioner's Appendix, at p. 18A.) It held that the sole expert physician offered by the Petitioner did not belong to the same medical specialty as this Respondent, nor was he familiar with the medication or procedure that was the subject of litigation. It held, as it had held in 1979, that a medical malpractice plaintiff who fails to introduce competent, knowledgeable expert testimony fails to establish a *prima facie* case. (Petitioner's Appendix, at p. 20A, *citing, Stevenson v. Nauton*, 71 Ill. App. 3d 831, 390 N.E.2d 53 (1979).) The Illinois Appellate Court recently applied the same rule to uphold a directed verdict against a medical malpractice plaintiff. *Thomas v. University of Chicago Lying-In Hosp.*, ____ Ill. App. 3d ____, ____ N.E.2d ____, 1991 Ill. App. LEXIS 1913 (1991).

No federal authorities were cited and discussed in the Illinois Appellate Court's review of Petitioner's evidence against this Respondent, nor was any "issue of first impression" decided in this review. The standards for expert testimony in medical malpractice cases have been consistently applied by the Illinois Appellate Court in *Stevenson*, in this case, and most recently, in *Thomas*. Petitioner's assertion that the Illinois Appellate Court departed from established law on this issue has no merit.

Petitioner had a jury trial in the Circuit Court of Cook County. To say that she was somehow deprived of her constitutional right of trial by jury because the Appellate Court reversed that judgment defies common sense. Petitioner's selection of expert testimony, and its adequacy under Illinois tort law, does not present a federal question.¹

¹ This Respondent does not believe that the remainder of the Petition presents a federal question, either. However, this Respondent addresses only that portion of the Illinois Appellate Court's opinion dealing with Petitioner's case against him.

CONCLUSION

For the foregoing reasons, the Petitioner's Petition for a Writ of Certiorari to the Illinois Appellate Court, First District, should be denied, as it presents no question of federal law.

Respectfully submitted,

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